

UNITED STATES DISTRICT COURT  
DISTRICT OF PUERTO RICO

JORGE FRANCISCO SANCHEZ,  
et al.,

Civil No. 08-2151 (JAF)

Plaintiffs,

V.

ESSO STANDARD OIL DE PUERTO RICO, INC.,

Defendant.

## **PRELIMINARY INJUNCTION FINDINGS AND CONCLUSIONS**

I.

This is a civil action filed pursuant to the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6972, seeking the imposition of civil penalties and the granting of injunctive relief. Notice requirements have been met under 42 U.S.C. § 6972. The amending dispositions to the Solid Waste Disposal Act by the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6991e, are also invoked. Jurisdiction is present under 28 U.S.C. §§ 1331 and 1337.

Plaintiffs Jorge Francisco Sánchez and a family-held corporation own a parcel of land with a gasoline-dispensing service station located in a populated area, Road No. 3, Km. 14, Canóvanas, Puerto Rico. The gasoline station has been in operation since the early 1960s. Originally, Shell Company operated the station. Esso Standard Oil Company (Puerto Rico) admits that they took over the service station in or around the year 1982. It is clear from the record that from 1982 to approximately 1988, gasoline dispensed in Puerto Rico

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3 was leaded gasoline. The currently-used unleaded gasoline product  
4 became available in the years 1988 to 1989.5 Since 1982, Defendant Esso has operated the Dolores Service  
6 Station and has installed and owned the service station's underground  
7 storage tanks, related pumps and pipelines, and the servicing  
8 equipment for the storage and dispensing of gasoline, diesel, and new  
9 and used oils. The underground tanks were originally steel tanks, and  
10 the evidence received at the preliminary injunction hearing confirms  
11 that the service station facility and equipment discharged hazardous  
12 petroleum-related products and discarded hazardous waste and related  
13 contaminants into the soils and groundwater below the Dolores Service  
Station. The record sustains the finding that at least since 1993,  
Defendant Esso knew of this condition.14 Hazardous waste and hazardous constituents or substances related  
15 to petroleum-based gasoline, diesel fuel, and used oils have left  
16 concentrations beyond allowable limits at the site's soils and  
17 groundwater. The presence of these contaminants causes damages to  
18 Plaintiffs' property, and creates a substantial health hazard to  
19 navigable waters of the United States, including the adjoining Río  
20 Grande de Loíza.21 **II.**22 Contaminated sites are a national problem in the United States,  
23 including the island of Puerto Rico. As a response to precisely those  
24 evils, Congress adopted a comprehensive federal regulatory program  
25 for the safe management of underground storage tanks as part of the  
26 RCRA. This regulatory program is managed in Puerto Rico by the local

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1 Environmental Quality Board (EQB). The EQB is the agency responsible  
2 for the implementation of the federally-sponsored Underground Storage  
3 Tank Program (USTP). Actually, the November 7, 1990 current Puerto  
4 Rico Underground Storage Tank Control Regulation (USTCR) was enacted  
5 by the EQB following the letter and spirit of the federal regulation  
6 that appears published in 40 C.F.R. Part 280. Its purpose is to  
7 ensure the protection of Puerto Rico's surface and groundwater  
8 resources. The regulation also protects the public health, the safety  
9 of underground tank systems, and the overall environment.

10 To coordinate the federal/state efforts of protecting the public  
11 health and the environment, in March 1997 the government of Puerto  
12 Rico and the U.S. Environmental Protection Agency (EPA) entered into  
13 a Memorandum of Agreement setting forth the roles, policies,  
14 responsibilities, and procedures for the sound management of the  
15 program by the EPA Region II and the EQB with respect to the USTP for  
16 the Commonwealth of Puerto Rico. This was done pursuant to section  
17 9004 of RCRA, 42 U.S.C. § 6991c, as amended. This working agreement  
18 establishes the manner in which the government of Puerto Rico and the  
19 EPA will coordinate the implementation and administration of the  
20 USTCR. The government of Puerto Rico, through the EQB, assumed  
21 primary responsibility for the implementation of the RCRA Underground  
22 Storage Tank Program within the territorial boundaries of Puerto  
23 Rico. The EPA retained the authority to make certain that the law  
24 and regulation would be followed, including direct federal  
25 implementation in the event that Puerto Rico was unable or failed to  
26 act.

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III.

Esso discontinued its contractual interest in the Dolores Service Station in October 2008, and Plaintiffs have requested Esso to remove the contamination released from their underground storage tanks and its related pipelines and service equipment from their property. During the hearing held December 2-3, 2008, the court was able to ascertain basic facts that warrant preliminary injunctive relief.

We will first make findings related to underground gasoline tank history.

Esso's relationship with Plaintiffs started in 1982. Until 1988, leaded gasoline was dispensed throughout Puerto Rico. The unleaded product became available in late 1988 or early 1989. Therefore, it is reasonable to assume that the Dolores Service Station sold Esso leaded gasoline up to late 1988.

The gasoline tanks existing in 1982 appear to be the same steel tanks that held leaded gasoline until they were changed for fiberglass tanks in January 1998. There is a documented use of such tanks as of 1985. See Defendant's Exhibit "7", supplemented with a complete copy of the document and attachment through Plaintiffs' Exhibit "7". The same tanks that were documented to exist in 1985 are the ones changed for fiberglass tanks in 1998. Therefore, the contamination of the site predates the 1998 tank change. As already mentioned, such contamination appears documented as far back as April 1993. See Plaintiffs' Exhibit 1.

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1           After the tank substitution that took place in January 1998, and  
2 since there existed documented contamination since at least 1993,  
3 Esso proceeded to perform a subsoils evaluation of the facility in  
4 November 2001, through Environmental Resource Technologies (ERTEC).  
5 ERTEC is the sole environmental contractor used by Esso in Puerto  
6 Rico since the year 2001.

7           The subsoils evaluation results were provided to Esso in  
8 February 2003, fifteen months after conducting the sampling. The  
9 subsoils evaluation results revealed the presence of Total Petroleum  
10 Hydrocarbon (TPH) in the diesel range. TPH was found in  
11 concentrations of 3,290 mg/kg in the soils above the groundwater  
12 surrounding the diesel underground storage tank. The concentration  
13 found was above the acceptable 100 mg/kg level set by the EQB. The  
14 subsoils evaluation report recommended that the facility's diesel  
15 underground tank and pipeline be tested as required by EQB UST Rule  
16 503(A). The tank and pipelines were not tested.

17           In September 2006, Esso once again contracted the services of  
18 ERTEC to perform an environmental evaluation of the facility to  
19 determine the presence of petroleum hydrocarbons in the soils and the  
20 groundwater. On November 14, 2006, ERTEC presented Esso with a Phase  
21 II Environmental Evaluation of the service station facility. The  
22 Phase II Environmental Evaluation revealed that the groundwater below  
23 the Esso Dolores Service Station is contaminated with the gasoline  
24 constituent Benzene. By reason of the Safe Drinking Water Act, 33  
25 U.S.C. §§ 455 et seq., Benzene is a hazardous substance regulated by  
the EPA. The Maximum Contaminant Level (MCL) of dissolved Benzene in

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1 groundwater established by EPA is 5 micrograms per liter of water  
2 (5 mg/l). For drinking water, it is 0.5 mg/l. Benzene is a known  
3 carcinogen. Water samples obtained in 2006 underneath the Esso  
4 Dolores Service Station revealed dissolved concentrations of Benzene  
5 as high as 2,800 mg/l.

6 The 2006 Phase II Environmental Evaluation concluded that the  
7 facility's Benzene groundwater contamination is "apparently related"  
8 to releases from the facility's Southeast area, where the gasoline  
9 underground tanks are located, and from the Northeast area, where  
10 grease traps are found. The evaluation also reported that the  
11 facility's soils are contaminated with gasoline, diesel, and oil.

12 A review of the EQB Quality Division UST Program File number UT-  
13 02-86-1255 confirms that Esso never informed the EQB of the soil and  
14 water contamination discovered in September 2006. The Dolores Service  
15 Station site is not listed in the Leaking Underground Storage Tank  
16 facility list (LUST) of the EQB, as required by the EPA, probably as  
17 a result of non-reporting.

18 As of today, Esso has minimized the gravity of the contamination  
19 and has not performed the necessary tests to properly investigate the  
20 amount of hazardous product that has leaked out since 1982 or the  
21 vertical or horizontal extent of the leakage. No organic lead  
22 analysis has ever been made.

23 As of today, Esso has distanced itself from its duty to confront  
24 the contaminated status of the property and has only taken bland  
25 mitigation measures, without committing itself to removing the  
26 contamination as required.

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1 Esso's apparent violations of its duties as lessee and operator  
2 of the Dolores Service Station borders on egregious conduct. Esso has  
3 been derelict by not fully reporting to EQB the suspicion of spills  
4 as required by the USTCR. It has not taken meaningful cleaning steps  
5 or carried out any meaningful aggressive form of mitigation.  
6 Mitigation efforts have been minimal and conservative to say the  
7 least. The mitigation efforts do not take into account the serious  
8 documented picture of contamination and appear directed at gaining  
9 time, in order to hopefully duck legal responsibility or have others,  
10 such as the Plaintiffs or another incoming petroleum company, deal  
11 with the problem generated by Esso's actions.

12 **IV.**

13 Expert testimony by Plaintiffs surprisingly tends to indicate  
14 that Esso has taken advantage of the EQB's long-standing history of  
15 non-intervention and laissez-faire to the corporation's advantage.  
16 The limited record developed at the hearing clearly shows Esso in  
17 command, directing the course of its environmental business without  
18 question by the local EQB.

19 Evidence of this appears to be on this record based on an  
20 undisputed series of violations to EQB's USTR and its federal  
21 counterpart in 40 C.F.R., Pt. 280. See Plaintiffs' Exhibit 1: Listed  
22 Violations in Exh. 1 to Rules 501, 503, 601, 602, 604, and 606.

23 In sum, a review of the undisputed paper record as it stands  
24 today reveals that Esso appears to be in continuous violations to the  
25 mentioned rules and the 40 C.F.R. counterparts, Part 280,  
26 Secs. 280.50, 280.52, 280.60, 280.61, 280.62, 280.63, and 280.65.

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These include, among others, failure to report, investigate or clean up spills from underground gasoline storage tanks; failure to take immediate action to prevent additional spills or to identify and mitigate; failure to undertake initial characterizations of the affected properties and quality of waters; failure to remove the spilled product; failure to consider and sweeping under the rug potential lead contamination accruing from 1982 to 1988; failure to notify closing or modification of operations, and failure to consider the possible contamination of the navigable waters of the Río Grande de Loíza.

v.

There being no doubt that there is a logical possibility of lead contamination at the site, we find that Esso failed to address that aspect of the site contamination at the time it changed tanks at Dolores Service Station in the year 1998. The record reflects that Esso excavation and contaminated soil disposition during the tank change did not consider lead as a contaminant. Soils were disposed of at an industrial waste site in Puerto Rico labeled as contaminated only with unleaded gasoline products. Obviously, lead contamination was an issue, and the willful blindness patent here is indicative of potential violations to the Solid Waste Disposal Act.

VI.

This court has made these findings on the basis of the undisputed evidence presented during the two-day hearing. We are of the opinion that the Plaintiffs confront obvious irreparable harm that imposes upon their property the gravamen of a contaminated site,

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2 limiting Plaintiffs' property right and future use of the facility.  
3 The costs associated with pre-cleanup studies and actual cleanup can  
4 reach astronomical monetary figures, and Esso must bear  
responsibility as required by law.

5 We find that there is no need to make a boilerplate exposition  
6 of irreparable harm and injunction law, because it is patently clear  
7 that this case fits the most restrictive measure for that remedy.

8 Therefore, the court **ORDERS** as follows:

9       1. **On or before December 18, 2008**, both parties will submit  
10 recommendations as to names of companies and/or entities that can  
11 perform a comprehensive site assessment before the court further  
12 orders Esso to remediate soil and groundwater contamination at the  
13 site originating from leaded gasoline, unleaded gasoline, and related  
14 petroleum-based products dispensed at the Esso Dolores Service  
15 Station during the period 1982 to October 31, 2008.

16       2. A hearing to consider the implementation of a comprehensive  
17 site assessment, at Esso's expense, will be held **on December 22,**  
18 **2008, at 9:30 A.M.** On said occasion, the parties are expected to  
19 offer testimony from potential participant companies which may be  
20 interested in and are capable of performing the assessment study  
21 contemplated here.

22       3. Not knowing whether ERTEC has the capability of competing  
23 for a court-authorized comprehensive site assessment, the court  
24 notifies the parties that ERTEC's close and exclusive working

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2 arrangements with Esso may disqualify that company from participating  
3 in the study.

4. The parties will jointly notify the EQB and the EPA of the  
5 issuance of this order, with proof of notice on record **within**  
**seventy-two (72) hours of issuance.**

6. In addition, and subject to the results of the scheduled  
7 December 22, 2008 hearing, Esso is not only enjoined and restrained  
8 from contributing by action or inaction to further environmental  
9 contamination at the site, but Esso will be ordered, depending on the  
10 results of the Comprehensive Site Assessment, to pay for all  
11 necessary testing, corrective actions, and removal of all pollution  
12 and contamination within the site and into adjacent areas as  
13 previously described.

14 **IT IS SO ORDERED.**

15 San Juan, Puerto Rico, this 5<sup>th</sup> day of December, 2008.

16 S/José Antonio Fusté  
17 JOSE ANTONIO FUSTE  
18 Chief U. S. District Judge